SK M&E BERSEKUTU SDN BHD v. PEMBINAAN LEGENDA UNGGUL SDN BHD & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ
AHMAD MAAROP PCA
AZAHAR MOHAMED FCJ
ROHANA YUSUF FCJ
MOHD ZAWAWI SALLEH FCJ
[CIVIL APPEALS NO: 02(f)-130-11-2017(W) & 02(f)-131-11-2017(W)]
12 MARCH 2019

CONTRACT: *Building contracts – Subcontract – Retention sum – Subcontract provided that some monies retained as retention sums to be released in two tranches – Contractors failed to release monies to subcontractors – Whether retention sums held on trust by contractor – Whether there was express clause providing for creation of trust over retention monies – Whether trust could still arise due to provision for release of retention monies upon any rectification work and since no notice of rectification was received from contractor – Whether it was implied by law retention sum was to be held in trust – Whether trust of retention sum could be constituted without appropriating and setting aside monies as separate trust fund*

TRUSTS: *Creation of trusts – Building contract – Subcontract – Retention sum – Subcontract provided that some monies retained as retention sums to be released in two tranches – Contractors failed to release monies to subcontractors – Whether retention sums held on trust by contractor – Whether there was express clause providing for creation of trust over retention monies – Whether trust could still arise due to provision for release of retention monies upon any rectification work and since no notice of rectification was received from contractor – Whether it was implied by law retention sum was to be held in trust – Whether trust of retention sum could be constituted without appropriating and setting aside monies as separate trust fund*

Pembinaan Legenda Unggul Sdn Bhd ('the respondent') had entered into two different subcontracts to appoint SK M&E Bersekutu Sdn Bhd and Geohan Sdn Bhd ('the appellants') as subcontractors. Both subcontracts provided that an amount of monies were retained by the respondent as retention monies, which were to be released to the appellants in two tranches. However, the respondent failed to release the retention monies. Following a creditors' meeting, the respondent was voluntarily wound up. Based on the statement of affairs of the respondent, the total amount owed to creditors for retention monies was RM8,230,087.61 and this included the total amount of retention sums owed to the appellants. The appellants commenced separate actions at the High Court, which were heard together, seeking an order for the respondent to preserve the retention monies in a separate account pending the final determination of the arbitration and/or adjudication proceedings.

Granting the reliefs sought by the appellants, the High Court held that (i) the retention sums were being held on trust by the respondent; and (ii) while there was no express clause providing for the creation of a trust over the retention monies, a trust could still arise due to the fact that there was a provision for the release of the retention monies upon any rectification work on any defect completed and since no notice of the same was received from the respondent. On appeal, the Court of Appeal reversed the decision of the High Court and held that there could be no trust because of the lack of an express clause or clear conduct from the parties and the retention monies were never segregated. Hence, the present appeals. The questions of law that arose for determination were (i) where a building contract provided that a certain percentage of the certified sum for works done by a contractor was to be retained by the employer until the conditions for the release of the retention sums are met, (a) was it implied by law that the retention sum was to be held in trust by the employer for the benefit of the contractor; or (b) was it a matter of construction, or interpretation of contract, whether or not the retention sum was to be held in trust by the employer for the benefit of the contractor; and (ii) where in a building contract, there existed an agreement that the retention sum was to be held on trust by the employer for the benefit of the contractor, could the trust of the retention sum be constituted without the employer first appropriating and setting aside the money as a separate trust fund.

Held (dismissing appeals with costs; affirming decision of Court of Appeal)

Per Richard Malanjum CJ delivering the judgment of the court:

(1) In the construction industry, the contract between an employer and a contractor usually contains a provision that gives the employer the right to retain certain percentage from the interim sums certified payable to the contractor for work done. Such a contractual provision may also stipulate the purpose of the retention sum, its management and keeping pending usage or release, and the time for its actual release to the contractor. Therefore, being a creature of a contractual provision, the legal status of a retention sum, including its management pending release to the rightful payee, is very much subject to the term or terms as stipulated in such a provision. (para 20)

(2) The retention money is money withheld by the employer from the sum otherwise certifiable to the contractor. It serves as a safeguard against the possibility of the contractor's failure to complete the works and against defective work. The amount retained is usually a small fraction of the work properly executed by the contractor. It is accumulated by deducting the appropriate percentage from the valuation of work at each interim payment. (para 26)

(3) Gleaned from the judicial decisions in the United Kingdom and Scotland and the views expressed by authors on retention sum, the legal principles that may be crystalised are (i) an agreement must employ sufficiently unambiguous terms to show that a trust is created with the contractor or subcontractor as the beneficiary; (ii) while an explicit clause creating a trust may be of help, it does not mean that an absence of such a clause negates the existence of a trust; (iii) there is no presumption that monies held in a separate account must necessarily be held on trust; (iv) each case depends on the parties' specific intention, as expressed in the relevant construction contract; and (v) even where there is a fiduciary relationship between an employer and a contractor, not every fiduciary is a trustee. Such a person can have obligations towards another's property even though it may not be vested in him. The nature and extent of a fiduciary's duties are variable and depend on the circumstances in each case. (para 32)

(4) There was no good reason to depart from the current approach adopted in the common law jurisdictions. In the present appeals, a perusal of the evidence did not disclose any facts to support the finding that a trust was in existence. There was also no clause mandating that the retention monies were to be kept separate from the assets of the respondent. The contract between the appellants and the respondent did not prohibit the mixing of the monies of the respondent with the retention monies. There was no clear intention or evidence of strong conduct from the parties that indicated the retention monies should be accorded the status of trust monies. The written and verbal testimonies were similarly devoid of anything capable of suggesting that the parties had agreed for the retention sums to be held by the respondent as fiduciary for the appellants. Indeed, the respondent did not take any additional steps, such as segregating the retention sums, that might then indicate that the retention monies should be considered as trust monies. In fact, there was no evidence of a separate account into which the retention monies were allocated. Such step would have allowed for easier identification of the retention sums as trust monies. (paras 38 & 40-42)

(5) The retention sums in the present appeals could not be said to be subject to a trust owing to an absence of express contractual words or conduct of the parties suggesting otherwise. Thus, the element of certainty of intention to constitute an express private trust failed. Furthermore, the source of the trust property from which the retention sums might be derived was not identifiable. There was consequently no certainty of subject matter. On the facts, implying a trust over the retention monies also ran counter to the *pari passu* principle now that the respondent was insolvent and would result in injustice to the other unsecured creditors. (para 48)

A ***Bahasa Malaysia*** *Headnotes*

Pembinaan Legenda Unggul Sdn Bhd ('responden') telah memeterai dua subkontrak berasingan melantik SK M&E Bersekutu Sdn Bhd dan Geohan Sdn Bhd ('perayu-perayu') sebagai subkontraktor. Kedua-dua subkontrak memperuntukkan sejumlah wang akan ditahan oleh responden sebagai wang
B tahanan, yang akan dilepaskan kepada perayu-perayu melalui dua bahagian. Walau bagaimanapun, responden gagal melepas wang tahanan ini. Berikutan satu mesyuarat pemiutang, responden digulung secara suka rela. Berdasarkan penyata hal ehwal responden, jumlah total yang dihutangi terhadap pemiutang-pemiutang ialah RM8,230,087.61 dan ini termasuk jumlah total
C wang tahanan yang dihutangi terhadap perayu-perayu. Perayu-perayu memulakan tindakan berasingan di Mahkamah Tinggi, yang dibicarakan bersekali, memohon perintah agar responden menyimpan wang tahanan dalam akaun berasingan sementara menanti pemutusan akhir prosiding timbang tara dan/atau adjudikasi. Membenarkan relief-relief yang dipohon
D oleh perayu-perayu, Mahkamah Tinggi memutuskan (i) wang tahanan dipegang sebagai amanah oleh responden; dan (ii) walaupun tiada klausa nyata yang memperuntukkan pembentukan amanah terhadap wang tahanan, satu amanah masih boleh berbangkit kerana terdapat peruntukan pelepasan wang tahanan apabila apa-apa kerja pembaikan kecacatan disempurnakan dan
E notis ini tidak diterima daripada responden. Susulan rayuan, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi dan memutuskan tidak boleh wujud amanah kerana tiada klausa nyata atau tindakan yang jelas oleh pihak-pihak dan wang tahanan tidak pernah diasingkan. Maka timbul rayuan-rayuan ini. Soalan-soalan yang timbul untuk diputuskan adalah (i) apabila
F satu kontrak bangunan memperuntukkan peratusan tertentu jumlah yang diakui untuk kerja-kerja yang dijalankan oleh kontraktor hendaklah ditahan oleh majikan hingga syarat-syarat pelepasan wang tahanan tersebut dipenuhi (a) adakah disiratkan oleh undang-undang bahawa wang tahanan ini dipegang secara amanah oleh majikan untuk manfaat kontraktor; atau (b) adakah menjadi hal perkara pembentukan, atau tafsiran kontrak, sama ada atau tidak
G wang tahanan ini dipegang secara amanah oleh majikan untuk manfaat kontraktor; dan (ii) apabila dalam kontrak bangunan, wujud satu perjanjian bahawa wang tahanan dipegang secara amanah oleh majikan untuk manfaat kontraktor, bolehkah wang tahanan tersebut dibuat tanpa majikan, terlebih dahulu, memegang dan mengetepikan wang tersebut sebagai dana amanah
H berasingan.

Diputuskan (menolak rayuan-rayuan dengan kos; mengesahkan keputusan Mahkamah Rayuan)
Oleh Richard Malanjum KHN menyampaikan penghakiman mahkamah:

I **(1)** Dalam industri pembangunan, kontrak antara majikan dan kontraktor, kebiasaannya, mengandungi peruntukan yang memberi majikan hak menahan peratusan tertentu daripada jumlah interim yang diakui perlu

dibayar kepada kontraktor untuk kerja yang dijalankan. Peruntukan kontraktual sedemikian juga boleh memperuntukkan tujuan wang tahanan ini, pengurusannya dan menyimpannya sementara menanti penggunaan atau pelepasan, dan masa pelepasan sebenarnya kepada kontraktor. Oleh itu, sebagai rekaan peruntukan kontraktual, status undang-undang wang tahanan, termasuk pengurusannya sementara menanti pelepasan kepada penerima yang berhak, amat tertakluk pada terma atau terma-terma yang dinyatakan dalam peruntukan sedemikian.

(2) Wang tahanan ialah wang yang ditahan oleh majikan berdasarkan jumlah yang kontraktor berhak. Ini bertujuan melindungi terhadap kemungkinan kontraktor gagal menyempurnakan kerja-kerja dan terhadap kerja-kerja yang cacat. Jumlah yang ditahan ini, kebiasaannya, sejumlah kecil daripada kerja yang dijalankan dengan teratur oleh kontraktor. Ini dikumpul dengan menolak peratusan yang sesuai daripada penilaian kerja semasa setiap bayaran interim.

(3) Mengutip keputusan-keputusan di United Kingdom dan Scotland dan pandangan-pandangan yang dizahirkan oleh penulis-penulis tentang wang tahanan, prinsip undang-undang yang boleh dibentuk adalah (i) satu perjanjian mesti menggunakan terma-terma yang tidak kabur untuk menunjukkan satu amanah dibuat dengan kontraktor atau subkontraktor sebagai benefisiari; (ii) walaupun klausa nyata pembentukan amanah mungkin membantu, ini tidak bermakna ketiadaan klausa sedemikian menidakkan kewujudan amanah; (iii) tiada anggapan bahawa wang yang dipegang dalam akaun berasingan semestinya dipegang sebagai amanah; (iv) setiap kes bergantung pada niat khusus pihak-pihak, seperti yang dizahirkan dalam kontrak pembangunan yang relevan; dan (v) jika pun terdapat hubungan fidusiari antara majikan dan kontraktor, bukan setiap fidusiari seorang pemegang amanah. Orang sedemikian boleh mempunyai kewajipan terhadap hartanah orang lain walaupun hartanah tersebut tidak terletak hak padanya. Sifat dan takat kewajipan fidusiari boleh diubah dan bergantung pada hal-hal keadaan setiap kes.

(4) Tiada alasan kukuh untuk menyimpang daripada pendekatan semasa yang diguna pakai dalam bidang kuasa common law. Dalam rayuan-rayuan ini, penelitian keterangan tidak mendedahkan apa-apa fakta yang menyokong dapatan bahawa wujud satu amanah. Tiada juga klausa yang memberi mandat agar wang tahanan disimpan berasingan daripada aset-aset responden. Kontrak antara perayu-perayu dan responden tidak melarang gabungan wang responden dengan wang tahanan. Tiada niat jelas atau keterangan kukuh tindakan pihak-pihak yang menunjukkan wang tahanan harus diberi status wang amanah. Keterangan bertulis dan lisan juga tidak mengandungi apa-apa yang boleh mencadangkan pihak-

A pihak bersetuju agar wang tahanan dipegang oleh responden sebagai fidusiari buat perayu-perayu. Sememangnya, responden tidak mengambil apa-apa langkah tambahan, seperti mengasingkan wang tahanan, yang mungkin menunjukkan wang tahanan harus dianggap wang amanah. Malah, tiada keterangan akaun berasingan yang B memperuntukkan wang tahanan. Langkah sebegini memudahkan pengenalpastian wang tahanan sebagai wang amanah.

(5) Wang tahanan dalam rayuan-rayuan ini tidak boleh dikatakan tertakluk pada amanah kerana ketiadaan perkataan-perkataan atau tindakan nyata oleh pihak-pihak tentang sebaliknya. Oleh itu, elemen kepastian niat C untuk membentuk amanah peribadi yang nyata, gagal. Tambahan lagi, sumber hartanah amanah, yang daripadanya mungkin wujud wang tahanan, tidak boleh dikenal pasti. Oleh itu, tiada kepastian hal perkara. Berdasarkan fakta, menyiratkan amanah dalam wang tahanan juga bertentangan dengan prinsip *pari passu* kerana responden kini insolven D dan ini akan menyebabkan ketidakadilan pada pemiutang-pemiutang tidak bercagar yang lain.

Case(s) referred to:

ABB Transmission & Distributions Sdn Bhd v. Sri Antan Sdn Bhd & Anor [2008] 10 CLJ 1 HC ***(refd)***

E *Balfour Beatty Ltd v. Britannia Life (1997) SLT 10* ***(refd)***

Clark Taylor & Co Ltd v. Quality Site Development (Edinburgh) Ltd 1981 SC 111 ***(refd)***

Farepak Food and Gifts Ltd (in Administration) v. Revenue and Customs [2006] EWHC 3272 (Ch) ***(refd)***

FR Absalom Ltd v. Great Western Garden Village Society [1933] AC 592 ***(refd)***

Geh Cheng Hooi & Ors v. Equipment Dynamics Sdn Bhd [1991] 1 CLJ 464; [1991] 1 CLJ (Rep) 133 SC ***(refd)***

F *Hunter v. Moss [1994] 3 All ER 215* ***(refd)***

Kumpulan Liziz Sdn Bhd v. Pembinaan OCK Sdn Bhd [2003] 4 CLJ 709 HC ***(refd)***

Lee Kam Chun v. Sykt Kukuh Maju Sdn Bhd; Sykt Perumahan Pegawai Kerajaan Sdn Bhd (Garnishee) [1988] 1 CLJ 52; [1988] 1 CLJ (Rep) 711 HC ***(refd)***

Lehman Brothers International (Europe) v. CRC [2012] UKSC 6 ***(refd)***

G *Mac-Jordan Construction Ltd v. Brookmount Erostin Ltd (in receivership) [1994] CLC 581* ***(refd)***

Qimonda Malaysia Sdn Bhd v. Sediabena Sdn Bhd & Anor [2011] 8 CLJ 269 CA ***(dist)***

Rayack Construction Ltd v. Lampeter Meat Co Ltd (1979) 12 BLR 30 ***(refd)***

Re C A Pacific Securities Ltd [2000] 1 BCLC 494 ***(refd)***

Re Kayford Ltd [1975] 1 All ER 604 ***(dist)***

H *Re Tout and Finch Ltd [1954] 1 WLR 178* ***(refd)***

Wates Construction (London) Limited v. Franthom Property Ltd [1991] 53 BLR 23 ***(refd)***

White v. Shortall [2006] NSWSC 1379 ***(refd)***

Wilmot v. Alton [1897] 1 QB 17 ***(refd)***

Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

I *Yew Sang Hong Ltd v. Hong Kong Housing Authority [2008] HKCA 109* ***(refd)***

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Powell-Smith, Vincent, *The Malaysian Standard Form of Building Contract (PAM/ISM* 69) (Singapore: Malayan Law Journal, 1990), p 147

Tucker, Lynton, *et al*, *Lewin on Trusts*, 19th edn, London: Sweet & Maxwell, 2015, p 102

Worthington, Sarah, *Proprietary Interests in Commercial Transactions*, Oxford: Claredon Press, 1996, p 190, footnote [16]

For the appellant - Lim Wai Loon, Rohan Arasoo & Teoh Yen Yee; M/s Harold & Lam Partnership

For the respondent - Chong Hooi Yin & Muhammad Iqram Zulkupri; M/s Azman Davidson & Co

[Editor's note: For the Court of Appeal judgment, please see Pembinaan Legenda Unggul Sdn Bhd v. Geohan Sdn Bhd & Another Appeal [2017] 1 LNS 1257 (affirmed); For the High Court judgment, please see [2016] 1 LNS 1443 (overruled).]

Reported by Najib Tamby

JUDGMENT

Richard Malanjum CJ:

Introduction

[1] The present appeals arise out of common issues of law in relation to actions brought by two different plaintiffs against the same defendant. The cases related to these appeals were heard together before the first instance court and the Court of Appeal. Each court rendered one judgment respectively. Thus, the appeals before us are Appeal No. 130 and Appeal No. 131 again heard together due to the common issues of law involved.

A **Appeal No. 130**

[2] The appellant in Appeal No. 130 (plaintiff at the High Court) was the respondent's (defendant at the High Court) sub-contractor for a mixed development project in Sungai Buloh, Selangor for the sum of RM9,789,815. Pursuant to cl. 16.3 of the sub-contract between the parties, a sum of
B RM489,490.75 was retained by the respondent as retention monies. The retention monies were to be released by the respondent to the appellant in two tranches: firstly, upon the issuance of the Certificate of Practical Completion ("CPC") of the main contract and secondly, upon the expiry of the defect liability period ("DLP").

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[3] Although the CPC was issued on 30 May 2013 and the DLP lapsed on 30 August 2015, the respondent did not release the first and the second tranches of the retention monies to the appellant.

Appeal No. 131

D **[4]** The appellant in Appeal No. 131 (plaintiff at the High Court) was engaged as the respondent's (defendant at the High Court) sub-contractor for a project in Johor for the sum of RM17,734,455,55. As in Appeal No. 130, cl. 16.3 of the sub-contract between the appellant and respondent in Appeal No. 131 provided for a sum of RM886,723 to be retained as retention
E monies where the first moiety was to be released by the respondent upon the issuance of the CPC and the second moiety was to be released upon the issuance of the Certificate of Making Good Defects ("CMGD") of the main contract works.

[5] For Appeal No. 131, the retention monies were never released to the
F appellant as well.

[6] On 2 November 2015, a creditors' meeting was held and a special resolution was passed for the voluntary winding up of the respondent.

[7] Based on the statement of affairs on the respondent as at 8 October
G 2015:

(i) the total debt owed to the unsecured creditors of the respondent was RM91,878,716.62;

(ii) the estimated net realisable value of the assets of the respondent was RM18,857,298 with cash at bank at RM547,786;
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(iii) the respondent's liabilities exceeded assets by RM73,019,479;

(iv) there are about 250 creditors, out of which around 128 are creditors claiming retention sums; and

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(v) the total amount owed to creditors for retention monies was RM8,230,087.61. This included the total amount of retention sums owed to the two appellants in the present appeals.

[8] The respondent did not open any bank account for the retention monies including those for the appellants in these appeals. For convenience, in this judgment both the appellants in these two appeals are collectively referred to as the appellants.

Before The High Court

[9] As alluded to above, the appellants respectively instituted an action at the High Court seeking leave to commence and proceed with court, arbitration and/or adjudication proceedings against the respondent and for the respondent to be ordered to preserve the retention sums in a separate account pending the final determination of the arbitration and/or adjudication proceedings.

[10] Relying on the Court of Appeal decision in *Qimonda Malaysia Sdn Bhd v. Sediabena Sdn Bhd & Anor* [2011] 8 CLJ 269; [2012] 3 MLJ 422, the High Court held that the retention sums were being held on trust by the respondent. The basis of such finding was that while there was no express clause providing for the creation of a trust over the retention monies, a trust could still arise due to the fact that there was a provision for the release of the retention monies upon any rectification work on any defect completed and since no notice was received from the respondent of any defect. Thus, the High Court granted the reliefs sought for by the appellants.

Before The Court Of Appeal

[11] On appeal, the Court of Appeal reversed the High Court decision. It held that there could be no trust because of the lack of an express clause or clear conduct from the parties as well as the retention monies were never segregated.

[12] The Court of Appeal took the view that a trust cannot be implied purely from the nature and purpose of retention monies *per se*, and that the concept of a trust is not inherent in the use of the word "deductions". It went on to hold that most construction contracts do not operate *via* a trust, unless otherwise expressly stated, but at the level of contract and debt: (See: *Farepak Food and Gifts Ltd (in Administration) v. Revenue and Customs* [2006] EWHC 3272 (Ch)). A mere debt is a chose in action and does not confer any beneficial right in retention monies on the basis of trust.

[13] The Court of Appeal went on to distinguish between these appeals and that of the decided cases, both local and foreign, based on the facts (See: *Rayack Construction Ltd v. Lampeter Meat Co Ltd* (1979) 12 BLR 30, *Mac-Jordan Construction Ltd v. Brookmount Erostin Ltd (in receivership)* [1994] CLC 581, *Kumpulan Liziz Sdn Bhd v. Pembinaan OCK Sdn Bhd* [2003] 4 CLJ

709). In those cases, there was an express clause in the contracts providing for the employers to hold the retention monies on trust for the contractors in a fiduciary capacity. But where there is no such or similar provision, a trust ought not to be construed as subsisting and more so when the conduct of parties does not lend itself to such an inference. The Court of Appeal also observed that there is no general proposition of law in a building contract that retention monies are, as a rule, held by way of trust between an employer and a contractor.

[14] While the Court of Appeal accepted the principle that a trust may exist without the necessity of having to use express words relating to trusts to create it (see: *Re Kayford Ltd* [1975] 1 All ER 604), it affirmed the principle that a trust fund may not come into existence just because a contractual clause provides so. Indeed it was pointed out by the Court of Appeal that there was a clear difference between an intention to create a trust and the creation of a valid trust. Thus, cl. 16.3 and the relevant provisions in the appendix related to the said clause could at best be said to have created a contractual obligation on the part of the employer to retain the monies in favour of the sub-contractor and to release them when the conditions have been satisfied. Any failure by the employer to comply with such obligation would be a contractual default.

[15] Another principle of law mentioned by the Court of Appeal is that traditionally under the law of equity and trusts, property must be separately identifiable in order to infer a trust so that there would be a tangible subject matter upon which the trust could be impressed.

[16] And it was suggested by the Court of Appeal that there should be set up a statutory mechanism for retention monies to be kept separately on trust for sub-contractors to ensure the protection of their interest, similar to what has been introduced in other jurisdictions.

Issues Before This Court

The Leave Questions

[17] On 26 October 2017, this court granted leave to appeal in relation to the following questions of law:

(i) Where a building contract provides that a certain percentage of the certified sum for work done by a contractor is to be retained by the employer until the conditions for the release of the sum retained ("retention sum") are met:

(a) is it implied by law that the retention sum is to be held in trust by the employer for the benefit of the contractor; or

(b) is it a matter of construction (interpretation of contract) whether or not the retention sum is to be held in trust by the employer for the benefit of the contractor?

(ii) Where in a building contract, there exists an agreement (whether arising by implication of law or upon construction of the contract) that the retention sum is to be held in trust by the employer for the benefit of the contractor, can the trust of the retention sum be constituted without the employer first appropriating and setting aside the money as a separate trust fund?

The Appellants' Submission

[18] The appellants assert that:

(i) in a construction contract retention monies are trust monies held by an employer in a fiduciary capacity, as trustee for the benefit of the contractor. The employer can only utilise these monies for the limited purpose of rectifying any defects and the balance is to be paid to the contractor;

(ii) since retention monies are to be applied only for a particular purpose, it follows that the contractor has a beneficial interest in them. Thus, it must be implied that retention monies are held by the employer on trust for the benefit of the contractor; and

(iii) there is no requirement that retention monies should first be separated from the assets of the employer if by implication they are considered trust monies.

The Respondent's Submission

[19] The respondent on the other hand contends that:

(i) the Court of Appeal in *Qimonda* (*supra)* did not reach a conclusion whether there was an implied trust before finding that the High Court was correct in law and in fact in holding that the retention monies "by their very nature and purpose are trust monies";

(ii) although it is indeed a common feature in many contracts for a percentage of the amount certified in interim payments to be deducted by the employer as retention monies, this common feature is by no means a universal feature and does not assist in a case where the words do not appear to show that retention monies by their very nature are held in a fiduciary capacity;

(iii) in the *Qimonda* case (*supra*) the Court of Appeal reliance on the cases of *FR Absalom Ltd v. Great Western Garden Village Society* [1933] AC 592, *Lee Kam Chun v. Sykt Kukuh Maju Sdn Bhd; Sykt Perumahan Pegawai Kerajaan Sdn Bhd (Garnishee)* [1988] 1 CLJ 52; [1988] 1 CLJ (Rep) 711; [1988] 1 MLJ 444, *Re Kayford (supra)*, *Geh Cheng Hooi & Ors v. Equipment Dynamics Sdn Bhd* [1991] 1 CLJ 464; [1991] 1 CLJ (Rep) 133; [1991] 1 MLJ 293, *ABB Transmissions & Distributions Sdn*

Bhd v. Sri Antan Sdn Bhd & Anor [2008] 10 CLJ 1; [2009] 7 MLJ 644 and *Kumpulan Liziz Sdn Bhd v. Pembinaan OCK Sdn Bhd* [2003] 4 CLJ 709 was misplaced. Those cases do not support the proposition that retention monies are trust monies. Thus, the categorical position in *Qimonda* (*supra*) that "retention monies by their very nature and purpose are trust monies held by the employer or main contractor for the contractor or subcontractor" is without basis;

(iv) the sub-contract agreements in the instant appeals do not contain an express trust provision. There are also no circumstances from which an implied trust can be held to arise;

(v) generally, a simple advance payment of money for a particular purpose is not enough to indicate that the recipient intended to hold it on trust for the payer;

(vi) there is a distinction between a trust and an obligation to create one;

(vii) the Court of Appeal in the instant cases correctly departed from *Qimonda* (*supra*) on the following points:

(a) it is not sufficient to create a trust in the absence of an express clause or clear intention;

(b) the subcontractors do not in the absence of a trust enjoy beneficial interest in the retention monies as their claim is in the nature of a debt; and

(c) if the proposition in *Qimonda* (*supra*) is accepted by this court, it would amount to enacting a new and general principle of law where a trust is implied by operation of law in all construction contracts where there is a deduction as retention monies.

(viii) the Court of Appeal in *Qimonda* (*supra*) did not take into account the subsequent English Court of Appeal decision in *Mac-Jordan* (*supra*) which held that since there was no setting aside of the fund before the employer went into receivership, there were no trust assets capable of identification. Under the law of equity and trusts, trust property must be identifiable; and

(ix) to allow the appellants to exercise their right to recover such retention sums would disadvantage the remaining 126 subcontractors who have similar claims let alone the other general unsecured creditors. The application of the *pari passu* rule in Malaysia is a statutory requirement and the maxim he who first has the strongest right simply has no place in insolvency law where the established rule of equality of treatment applies.

Decision Of This Court

[20] In the construction industry, the contract between an employer and a contractor usually has a provision that gives the employer the right to retain certain percentage from the interim sums certified payable to the contractor for work done. Such a contractual provision may also stipulate the purpose of the retention sum, its management and keeping pending usage or release, and the time for its actual release to the contractor. Therefore, being a creature of a contractual provision, the legal status of a retention sum, including its management pending release to the rightful payee, is very much subject to the term or terms as stipulated in such a provision.

[21] In Appeal No. 130, the sub-contract entered into between the appellant and the respondent contained cl. 16.3 which reads:

> Unless otherwise stated in the appendix, each and every payment for Interim Claim shall be subjected to a 10% retention sum to the maximum limit of 5% of the Sub-Contract Price.

[22] The appendix to the conditions of the sub-contract aforementioned which relates to the release of retention sum provides that:

> [The] 1st moiety shall be released upon issuance of Certificate of Practical Completion (CPC) of the Main Contract Works and will be forward a copy accordingly;
>
> [The] 2nd moiety shall be released upon issuance of the Certificate of Completion of Making Good Defects (CMGD) of the Main Contract Works and will be forward a copy accordingly.

[23] In Appeal No. 131, the sub-contract entered between the appellant and the respondent also has an identical provision as cl. 16.3.

[24] However, the appendix to the conditions of sub-contract provides that 2.5% of the retention sum will be released to the appellant upon the issuance of the CPC while the balance is to be returned upon the end of the DLP.

[25] It can therefore be seen that cl. 16.3 and the appendix thereto clearly provide the right to retain the retention sums and when to release them. What then is the status in law of retention sums in Malaysia? Is it under trust or just money due and owing in the event that it is not released as provided for in cl. 16.3 and in the appendix of the subcontract?

[26] As alluded to above, retention money is money withheld by the employer from the sum otherwise certifiable to the contractor. It serves as a safeguard against the possibility of the contractor's failure to complete the works and against defective work (See: *Powell-Smith, Vincent, The Malaysian Standard Form of Building Contract (PAM/ISM 69),* (Singapore: Malayan Law Journal, 1990), at p. 147; LexisNexis, *Halsbury's Laws of England*, vol. 6, 2011, 5th edn, *Building Contracts, '3 Certification and Remuneration'* [347]).

A The amount retained is usually a small fraction of the work properly executed by the contractor. It is accumulated by deducting the appropriate percentage from the valuation of work at each interim payment. (See: Chappell, David, *Construction Contracts: Questions and Answers*, 2nd edn, (England: Routledge, 2010) at p. 168).

B **[27]** The status of retention sum under English law is circumscribed by the standard-term building contracts of the United Kingdom. In such a term, the employer undertakes to hold the retention sum on trust for the contractor. For instance, cl. 30.5.1 of the UK standard construction contract JCT 1998 provides that the "employer's interest in the retention is fiduciary as trustee C for the contractor and for any nominated sub-contractor". The effect of such a contractual provision is to impose upon the employer a personal obligation to appropriate and set aside as a trust fund the amount of retention money withheld. If this is successfully done, the contractor's claim to the retention money takes priority over the employer's general creditors in the event of D the employer's insolvency, and a liquidator of the employer would be obliged to hand over the retention fund in full to the contractors and sub-contractors involved.

[28] Thus, in the United Kingdom when a solvent employer neglects to perform its obligation as mandated by such clause the contractor may apply E for a mandatory injunction against such employer. The employer is then compelled to set aside the retention sum in order to protect the contractor against the employer's insolvency (See: *Rayack Construction Ltd v. Lampeter Meat Co Ltd (supra)*; *Wates Construction (London) Limited v. Franthom Property Ltd* [1991] 53 BLR 23).

F **[29]** However, the position would be different where the contractor had gone into liquidation without having set aside as a trust fund the amount of retention money withheld. The question of trust does not arise in such a situation since there is no *res* to which the trust can attach. Thus, if the employer merely deducts the contractually agreed percentage from interim G payments which he would have otherwise paid to the contractor, there is only a withholding of payment instead of the setting up of a distinct fund. There would consequently be no trust asset to which the contractor could have recourse in the event of the employer's insolvency (See: Goode, Roy, *Principles of Corporate Insolvency Law*, 4th edn, (London, *Sweet & Maxwell*, H 2001), para. [44] at pp. 214-215).

[30] It is therefore essential under English law that where parties have agreed by contract for the retention monies to be impressed with a trust, it is vital for the trust to have been established before the employer's insolvency. Otherwise, the money will form part of the monies to be I distributed *pari passu* in the winding-up, and the contractor will be unsecured (See: Dennys, Nicholas and Robert Clay, *Hudson's Building and Engineering*

Contracts, 13th edn, (London, Sweet & Maxwell, 2015), para. [5-068] at pp. 698-699). Such a situation arose in *Mac-Jordan Construction Ltd v. Brookmount Erostin Ltd (supra)* and *Wilmot v. Alton* [1897] 1 QB 17. In those cases, it was found that there was no proprietary interests in the respective building retention funds. There were no identifiable assets that could be the subject of the established mandatory and unconditional personal obligation (See: Worthington, Sarah, *Proprietary Interests in Commercial Transactions*, (Oxford: Claredon Press, 1996), at p. 190, footnote [16]).

[31] The Scottish position appears to be similar as that of English position. Even if the contract provides a mechanism whereby the retention deducted by the employer is to be held on trust on behalf of the contractor, the existence of express terms *per se* is insufficient to create a trust without any other actions (such as the setting aside of the monies) on the part of the employer (See: *Clark Taylor & Co. Ltd v. Quality Site Development (Edinburgh) Ltd* 1981 SC 111 and *Balfour Beatty Ltd v. Britannia Life* (1997) SLT 10. This would mean that in Scotland, under the standard building contract and the design and build contract, if an employer becomes insolvent, then, in respect of the payment of retention fund that has been deducted, the contractor may find themselves in no better position than other ordinary creditors (See: MacRoberts, *MacRoberts on Scottish Construction Contracts*, 3rd edn, (UK: John Wiley & Sons, 2015), at pp. 225-226).

[32] Thus, gleaned from the judicial decisions in the United Kingdom and Scotland and the views expressed by learned authors on retention sum, the legal principles that may be crystalised are these:

(i) An agreement must employ sufficiently unambiguous terms to show that a trust is created with the contractor or subcontractor as the beneficiary (See: Davis, Richard, *Construction Insolvency: Security, Risk and Renewal in Construction Contracts*, 5th edn, (London: Sweet & Maxwell, 2014), paras. [10-006] at pp. 389-390; *Re Tout and Finch Ltd* [1954] 1 WLR 178; [1954] 1 All ER 127 per Wynn-Parry J);

(ii) While an explicit clause creating a trust may be of help, it does not mean that an absence of such a clause negates the existence of a trust;

(iii) There is no presumption that monies held in a separate account must necessarily be held on trust;

(iv) At any rate, each case depends on the parties' specific intention as expressed in the relevant construction contract. (See: Bailey, Julian, *Construction Law Volume* (II), (England: Informal Law (Routledge), 2011), at p. 898); and

(v) Even where there is a fiduciary relationship between an employer and a contractor, not every fiduciary is a trustee. Such a person can have obligations towards another's property even though it may not be vested in him. The nature and extent of a fiduciary's duties are variable and depend on the circumstances in each case.

[33] Now, reverting to the basics, it is a settled principle of law that in order for the legal relationship of trustee and beneficiary to come into existence as regards express private trusts, three essential features must be present. They are (a) certainty of words; (b) certainty of subject; and (c) certainty of object (See: Tucker, Lynton, *et al, Lewin on Trusts*, 19th edn, (London: Sweet & Maxwell, 2015) at p. 102; Haley, Michael and Lara McMurty, "*The Three Certainties", Equity & Trusts*, 5th edn, (London: Sweet & Maxwell, 2017) at p. 44); *Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals* [1994] 3 CLJ 20; [1994] 2 MLJ 614 SC at 624). Under a trust, a party holding title to property is subject to an obligation to keep or use the property for the benefit of another party. The person holding the property for another's benefit is called a trustee, while the person benefiting from the trust is called the beneficiary. The property covered by the trust is the trust property.

[34] In *Qimonda* (*supra*) the Court of Appeal found that there was a trust of the retention sum despite the absence of express trust clause or words to that effect in the contract and there were no unusual terms as well. In that case, no fund was set aside before the liquidation, nor had the contractor requested it. Although the court held that the "requisites" of a valid trust were present, there seemed to be no evidence of either intention or trust property. While the agreement only demonstrated a contractual scheme and nothing further was said about the correspondence yet the court held that they manifested the clear intention of the parties. Further, the case of *Re Kayford* (*supra*) was relied upon as authority for the proposition that it was not necessary to set money aside. But, with respect, *Re Kayford* (*supra*) was decided in the context of payment actually received from customers paying for goods in advance. In *Qimonda* (*supra*) there was no payment by the contractor that could constitute trust property. There was only the agreement that the employer would release the retention sum to the contractor conditional upon the final correction of defects (See: Davis, Richard, *Construction Insolvency: Security, Risk and Renewal in Construction Contracts*, 5th edn, (London: Sweet & Maxwell, 2014), paras. [10-006] at pp. [389]-[390]). Accordingly, we find it difficult to sustain the decision in *Qimonda* (*supra*) in the light of the settled principles in trust law.

[35] Having read the judgment of the Court of Appeal in these appeals, we are inclined to agree with the reasons given therein. We find that the approach is generally consistent with the English approach. As elucidated above, English authorities require that if retention monies are to be impressed with trust, the contract should identify by clear wordings that the retention monies are held in trust and for the trust fund to be established before the insolvency. Such approach would appear to be consistent as seen from the decisions in *Rayack Construction Ltd v. Lampeter Meat Co Ltd* (*supra*) which was followed in both *Wates Construction (London) Limited v. Franthom*

Property Ltd (*supra*) and *Mac-Jordan Construction Limited v. Brookmount Erostin Ltd* (*supra*). While it may appear that the English approach is strict, it is still preferable for it tempers the risk of uncertainty and the likely competing claims that would ensue if the *Qimonda* (*supra*) approach is adopted. It also avoids the undesirability of not applying the assets in the hands of liquidators *pari passu* (except where monies are clearly identified as trust monies relating to a trust fund established before the insolvency of the employer) (See: Dennys, Nicholas and Robert Clay, *Hudson's Building and Engineering Contracts*, *op. cit.* para. [5-068] at p. 699).

[36] We would also say that the requirement to keep a retention sum segregated from and unmixed with other monies of an employer is very much a significant indicator of the parties' intention. Although in *Qimonda* (*supra*) the Court of Appeal relied on *Absalom* (*supra*), we find upon further consideration in that case, the House of Lords did not go so far as to say that retention monies should be held in a fiduciary capacity notwithstanding the absence of any express trust provision in a contract.

[37] We note that the Hong Kong Court of Appeal had a similar issue before it in the case of *Yew Sang Hong Ltd v. Hong Kong Housing Authority* [2008] HKCA 109; [2008] BLR 563 at [52]-[59]. The court took the English approach in deciding on the issue declining to adopt the reasoning in *Qimonda* (*supra*). It preferred to uphold the *pari passu* principle when it said this at para. [13]: "to allow a creditor a restitutionary remedy in the interest of "doing justice" in a specific case would only lead to that creditor jumping the queue of unsecured creditors and so bring about injustice in everyone else's case."

[38] Accordingly, we have no good reason to depart from the current approach adopted in the common law jurisdictions. As such, in these appeals, our perusal of the evidence did not disclose any facts to support the finding that a trust was in existence.

[39] Besides the contractual provisions of cl. 16.3 and the appendix of the conditions of sub-contract reproduced hereinabove, there is no express provision specifically requiring the retention sums in Appeal No. 130 and Appeal No. 131 to be held on trust with the employer as the fiduciary.

[40] There was also no clause mandating that the retention monies were to be kept separate from the assets of the respondent. The contract between the appellants and the respondent did not prohibit the mixing of the monies of the respondent with the retention monies.

[41] We are also unable to discern any clear intention or evidence of strong conduct from the parties that indicated the retention monies should be accorded the status of trust monies. The written and verbal testimonies were similarly devoid of anything capable of suggesting that the parties had agreed for the retention sums to be held by the respondent as fiduciary for the appellants.

[42] Indeed the respondent did not take any additional steps such as segregating the retention sums that might then indicate that the retention monies should be considered as trust monies. In fact, there is no evidence of a separate account into which the retention monies were allocated. Such step would have allowed for easier identification of the retention sums as trust monies.

[43] We have not overlooked that there is an emerging trend of judicial thought which posits that monies forming part of a larger bulk do not fail to be impressed with a trust for uncertainty of subject matter simply because they have not been isolated from the general assets of the insolvent company, if the monies are capable of identification as a proportion of the whole fund. This proposition which rests on the "fungible" nature of money is borne out by cases such as *Hunter v. Moss* [1994] 3 All ER 215, *Lehman Brothers International (Europe) v. CRC* [2012] UKSC 6, *White v. Shortall* [2006] NSWSC 1379 and *Re C A Pacific Securities Ltd* [2000] 1 BCLC 494. In our considered opinion, the principle in the aforementioned authorities has no bearing on the present appeals in view of the factual matrix in these cases.

[44] We are very conscious that in declining to take the approach as in *Qimonda* (*supra*), contractors and subcontractors are exposed to high risk in the event of the employers going into liquidation. However, in other jurisdictions such as the United Kingdom, Australia, and New Zealand similar issue also arose. Reforms were undertaken to address the issue.

[45] One possible solution is to enact legislation enabling retention sums to be placed in authorised deposit-taking institutions such as banks. Failure to do so would invalidate the provision on the retention sum in the contract. Another solution may be to legislate that retention sums should be deemed as trust monies.

[46] In Australia, a mandatory deposit scheme was introduced in New South Wales. In Western Australia and the Northern Territory, it is legislation that prescribes for the creation of a trust where the parties do not provide otherwise in their contract. (See: Australia, Parliament of Australia, "Chapter 10: A Statutory Construction Trust", *Senate Standing Committees on Economics: Insolvency in the Australian Construction Industry*, 8 February 2019 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/In solvency_construction/Report/c10>).

[47] Another country, New Zealand recently implemented a statutory regime where a trust is imposed over retention monies regardless of whether they are held in a separate trust fund. Under the New Zealand model, the mixing of retention monies with other sums has no bearing on their status as trust monies. (See: New Zealand, Ministry of Business, Innovation and Employment, *Construction Contracts Amendment Act 2015*, 8 February 2019).

[48] In summary, the retention sums in the instant appeals cannot be said to be subject to a trust owing to an absence of express contractual words or conduct of the parties suggesting otherwise. Thus, the element of certainty of intention to constitute an express private trust fails. Furthermore, the source of the trust property from which the retention sums may be derived is not identifiable. There is consequently no certainty of subject matter. On the facts, implying a trust over the retention monies also runs counter to the *pari passu* principle now that the respondent is insolvent and would result in injustice to the other unsecured creditors.

[49] For the reasons stated above, question (i)(a) of the leave question is answered in the negative. Leave question (i)(b) is answered in the affirmative while leave question (ii) is answered in the negative.

[50] We therefore dismiss these appeals with costs. The decisions of the Court of Appeal in both appeals are affirmed.